Supreme Court of the United States

OCTOBER TERM, 1897

EDGEWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,

Petitioner,

vs.

THE CARR, RYDER & ENGLER CO.

Respondent.

Petition for Writ of Certiorari

TO

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BLUFORD WILSON AND
PHILIP BARTON WARREN,
Solicitors for Petitioner.

Supreme Court of the United States

October Term, 1897

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,
Appellant,

vs.

THE CARR, RYDER & ENGLER COMPANY,
Appellee.

Petition for Certiorari.

To the Supreme Court of the United States of America:

The petition of C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, under the provisions of Section six of the Act of Congress, approved March 3d. 1891, and ordering that the records in a certain appeal be certified to this honorable court for its review and determination; said appeal is entitled as follows: "C. H. Bosworth, receiver Chicago, Peoria & St Louis Railway Company, appellant, vs The Carr, Ryder & Engler Company, appellee; No. 454; October Term, A. D. 1896; United States Circuit Court of Appeals, for the Seventh Circuit"

Statement of Case.

Your petitioner further respectfully shows to this honorable court, as follows:

That pursuant to an order duly entered in the United States Circuit Court for the Southern District of Illinois, in a cause therein pending wherein the Mercantile Trust Company, et al, were complainants and the Chicago, Peoria & St. Louis Railway Company, et al, were defendants, he was appointed receiver of all of the property of said defendant railway company, and immediately took possession thereunder, and from that time until the first day of February, 1896, he was in the possession and operation, as such receiver, of the railroad and property of said defendant railway company.

That on the 21st day of February, 1895, the Carr, Ryder & Engler Company, by its solicitors, filed its intervening petition in the said cause of the Mercantile Trust Company against the Chicago, Peoria & St. Louis Railway Company; that in and by said intervening petition, it was alleged that the petitioner was a corporation existing under and by virtue of the laws of the State of Iowa, with its principal office at the city of Dubuque; that on the 20th day of October, 1894, the petitioner delivered at Dubuque, Iowa, to the Chicago, Milwaukee & St. Paul Railway Company, a quantity of manufactured doors, sash, blinds, etc.,

for the purpose of having the same transported by the said railway and connecting lines of railroad, from Dubuque, Iowa, to Birmingham, Alabama; that on the 24th day of October, 1894, the said doors, sash, blinds, etc., were loaded into a car of the Chicago, Rock Island and Pacific Railway Company, number 1004, and consigned to the May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis, Illinois; that said property was of the value of $777.28; that said car was transported by the said Chicago, Milwaukee & St. Paul Railway Company to Rock Island and delivered to the Rock Island & Peoria Railway Company, and by said last named company transported to Peoria, and there delivered to the Chicago, Peoria & St. Louis Railway Company, to be transported by it to East St. Louis, and there to be delivered to the next connecting line of railroad, and so on to its destination; that said Chicago, Peoria & St. Louis Railway Company received said car and transported the same as far as East St. Louis, a station on its line of railroad, and while the same was still in transit and on its way to destination, and in the possession and under the control of said Chicago, Peoria & St. Louis Railway Company, the said car and property were destroyed by fire on the evening of the 28th day of October, 1894, and that the petitioner suffered damage to the amount of the value of said sash, doors, blinds, etc., namely, $777.28.

Said intervening petition further alleges the appointment of C. H. Bosworth as receiver of the Chicago, Peoria & St. Louis Railway, and that at the time he was operating said property, the liability of such railway company to the petitioner was incurred; and is of such a nature as entitles it to a priority over debts and demands secured by the mortgages

To this intervening petition, C. H. Bosworth, as receiver, filed his answer on the 11th day of March, 1895, in which he denied that at the time said car and contents were destroyed by fire, they were in his possession, custody or control; and further answering the said receiver alleged that after the said cars had been delivered to him, and before their destruction by fire, they were delivered to the Terminal Railroad Association of St. Louis; that at the time of their destruction by fire, they were in the sole custody, care and control of said Terminal Railroad Association, under a certain agreement between the Chicago, Peoria & St. Louis Railway Company, and the said Terminal Railroad Association, by which the latter contracted to give to the former terminal facilities at East St. Louis and to handle and care for its freight, including the property mentioned; and further answering, alleged that the property mentioned in said intervening petition, was in the care of the said Terminal Association in the course of a regular interchange of business with that Association, in accordance with the custom

that had been in force for the past four years, by which it became and was the duty of said Terminal Association to exercise due care and caution in the safe keeping and handling of said cars and freight, while in the custody and control of the same; and further alleging, that the Terminal Association wilfully and negligently, stored the said property in close proximity to a certain lot of bailed hay, which hay was fired by sparks from a certain passing switch engine belonging to the said Terminal Association, which fire was communicated to the property mentioned in said intervening petition; and further answering alleged, that in addition to the property described in said intervening petition, more than forty cars and their valuable contents were either wholly destroyed or damaged; further answering, the receiver denied that the petitioner was entitled to the relief, or any part thereof, demanded.

Your petitioner further respectfully represents that on the 27th day of August, 1895, for the purpose of saving the labor and expense of making proof, it was stipulated by the parties that the said Carr, Ryder & Engler Company is a corporation, as alleged, having its place of business at the city of Dubuque, Iowa; that on the 20th day of October, 1894, it delivered to the Chicago, Milwaukee & St. Paul Railway Company, at Dubuque, the property mentioned in its petition, consigned to the May & Thomas Hardware Company, at

Birmingham, Alabama, by way of East St. Louis, and was loaded in a car of the Rock Island & Pacific Railway Company, No. 1004, and was to be transported to destination, pursuant to the bill of lading issued therefor, which bill was attached to the stipulation; that while said property was in transit it was destroyed by fire at East St. Louis on the evening of the 28th day of October, 1894; that at the time it was destroyed the petitioner was the owner, and that the property was of the value of $777.28; and petitioner was damaged in that sum, and shall be entitled to recover that amount, if it shall be adjudged that it is entitled to recover in this proceeding.

C. H. Bosworth, receiver, your petitioner in this application, further respectfully shows unto this court that, after the facts were stipulated to as above set out, both parties proceeded to the taking of testimony as to the question of whether or not at the time the loss occurred, the property was in the possession of your petitioner, as such receiver. On this point the evidence shows that, after your petitioner received said car at Pekin, Illinois, he hauled the same to a point immediately beyond the terminus of his own rails at East St. Louis, and placed said car on certain "Y" rails of the Terminal Railroad Association, reaching that point about 3 o'clock on the afternoon of October 28th, 1894; that the servants of the Terminal Railroad Association of St. Louis, in the usual course of em-

ployment by that company, then hauled the car to a certain customary halting place on the premises of their employer; using for the purpose an engine which be longed to their employer; here they left said car stationary, until the evening of that day, when it was destroyed by fire; and that in the usual course of business the Terminal Association, after obtaining from the receiver a way-bill or memorandum, indicating the ultimate destination of said car, would have hauled the same over its own rails in East St. Louis, or over rails subject to its control for that purpose, and delivered the same to a carrier on whose rails the transit south was to continue.

Your petitioner further represents that said evidence further showed that the Terminal Railroad Association in fact took, and at the time of the loss, had the actual physical custody and care of the property; that the haul over the tracks of the Terminal, from the point where the receiver's servants parted from the car, to the point where the loss occurred, was a portion of the transit to be made in any case, no matter what the ultimate destination of the car might be; that for the purpose of moving the car thus far the information as to the ultimate destination, which a way-bill would have given was not needed; that no way-bill had up to that time been delivered, but that it does not appear that the lack of the information contained in such way-bill contributed in any

way to the loss; that it further appeared that in the carrying business conducted by the Terminal Association the car in question would remain stationary for a time, and thereafter be hauled, probably with other cars, grouped for the purpose, to the starting place of the carrier who was to take it south; that information as to the ultimate destination and route had not as yet been actually imparted by the receiver to the Terminal Association, but that the latter was content for the time being, to treat such information, then in the possession of the receiver, as sufficiently available to itself.

C. H. Bosworth, the petitioner in this application, further respectfully represents unto this honorable court, that on the 10th day of April, 1896, the Master in Chancery, to whom said intervening petition was referred, filed his report, in which he found that the said car and its contents were held by the receiver as a common carrier at the time of its loss; and that the intervener had a just claim against said receiver in the sum of $777.28.

C. H. Bosworth, your petitioner in this application further respectfully represents unto this honorable court, that on the the 27th day of April, 1896, he filed his exceptions to the said master's report; that the same were overruled, and said report approved on the 3d day of March, 1897; that on the 5th day of April, 1897, a decree was entered by the United States Cir-

cuit Court for the Southern District of Illinois, affirming the said master's report and ordering said receiver to pay to intervening petitioner the said sum of $777.28 with interest.

C. H. Bosworth, your petitioner in this application, further represents unto this honorable court, that on the 5th day of April, 1897, he prayed for, obtained and perfected an appeal to the United States Circuit Court of Appeals for the seventh Circuit from the said decree of the United States Circuit Court for the Southern District of Illinois, and duly assigned his errors on the record.

C. H. Bosworth, your petitioner in this application further respectfully shows unto this honorable court, that said appeal came on for hearing in said Circuit Court of Appeals before their Honors, Judges Woods, Jenkins and Showalter, and was argued in said court, and subsequently, on the 25th day of February, 1898, the said Circuit Court of Appeals handed down its decision wherein and whereby the said decree of the United States Circuit Court for the Southern District of Ilinois was affirmed, his Honor, Judge Showalter, dissenting therefrom; a copy of which opinion is attached to the transcript of record certified to this court.

That thereafter, on or about the 25th day of March, 1898, your petitioner filed his petition in said Circuit Court of Appeals for a rehearing, which petition was

subsequently on or about the 1st day of April, 1898, overruled, a copy of which petition is also attached to the transcript of record certified to this court.

C. H. Bosworth, your petitioner in this application, further respectfully shows unto this honorable court that a great number of intervening petitions were filed in the foreclosure cause pending in the United States Circuit Court for the Southern District of Illinois, for claims arising out of this same fire; that the Master in Chancery of the Circuit Court found him liable in each and every of the cases; that for the purpose of avoiding the expense of an appeal in each and every case, it was agreed between counsel that four different cases should be appealed, and stipulations were entered into that the other cases should abide the result of those cases thus appealed; that of the other cases appealed all three involved shipments of barley to grain brokers, for sale on the grain exchange in St. Louis; that in the trial it was shown that an agreement existed between these grain brokers and the Terminal Railroad Association, by which the latter was to hold such barley in store on its tracks in East St. Louis until the same could be sold; that by reason of this agreement, among other things, the Circuit Court of Appeals reversed the decree of the Circuit Court entered in the three other appeals; that all four of these appeals were submitted to and were considered by the Court of Appeals at one hearing and

one opinion rendered to cover all; that in that opinion the court of appeals declared that inasmuch as the agreement as to barley had no application to the Carr, Ryder & Engler case, the decree of the Circuit Court in favor of that company was right; the Court of Appeals was of the opinion that though in the physical possession of this particular car, (in the case at bar) the Terminal Association had not become responsible as a carrier therefor, because it had not been put in possession of a way-bill or other form of information on which it could proceed with the carrying

C. H. Bosworth, your petitioner in this application, further respectfuliy represents unto this honorable court, that the question of delivery of freight between connecting carriers involves a grave and important question of law; that the question as to whether a terminal railroad in switching cars is a common and connecting carrier is also a grave and important question which has never been directly decided by this hororable court; that the decision of the said Court of Appeals is at variance with the decision of this honorable court, and that the errors made therein can only be authoritively corrected in this honorable court; and as to the matters so at variance, as well as to divers other matters, the said decision of the said Circuit Court of Appeals for the Seventh Circuit contains manifest errors of law; and that it is the province of this honorable court to harmonize said conflicting decisions and correct the errors therein.

Your petitioner further respectfully shows unto this honorable court that he has filed herewith and made a part of this application his assignment of variance and of error; and that he has also caused a certified copy of the transcript of the record in this case to be made, and that the same is also filed herewith as a part hereof.

Whereupon your petitioner respectfully prays that this honorable court may be pleased to grant a writ of certiorari, requiring the case entitled "C. H. Bosworth, receiver Chicago, Peoria & St. Louis Railway Company, appellant. vs. the Carr, Ryder & Engler Company, appellee; No. 454; October Term. A D 1896; United States Circuit Court of Appeals for the Seventh Circuit" to be certified to this honorable court for its review and determination.

C. H. BOSWORTH, *Receiver*,
Chicago, Peoria & St. Louis Railway,
By Bluford Wilson
Philip Barton Warren.
His Solicitors.

Assignment of Variance.

And now comes C. H. Bosworth, receiver Chicago, Peoria & St. Louis Railway, by Bluford Wilson and Philip Barton Warren, his solicitors, and says there is manifest variance in the judgment and decree rendered by the United States Circuit Court of Appeals for the Seventh Judicial Circuit aforesaid, with the judgments

and decrees of this the honorable Supreme Court of the United States of America in like cases, and specifies the following to-wit:

First.

That in the case at bar the court says: (Op. p. 12)

> "Though in physical possession, under its agreement with the receiver, of the car in which the goods were to be transported, the Terminal Association had not become responsible as a carrier therefore, because it had not been put in possession of a way-bill, or other form of information on which it could proceed with the carriage."

While in *Pratt vs. Grand Trunk Railway Co., 95 U. S., 43*, this honorable court holds that where by custom or agreement there is a designated place of deposit between two connecting carriers, delivery is made by such deposit, although shipping directions had not as yet been given from the first to the second carrier.

Wherefore the said C. H. Bosworth, receiver Chicago, Peoria & St. Louis Railway Company, petitioner herein, prays a writ of certiorari requiring the aforesaid cause to be certified to this honorable court for its review and determination.

Benford Wilson
Philip Barton Marr

Solicitors for Petitioner.

Assignment of Errors.

And now comes C. H Bosworth, receiver, Chicago, Peoria & St. Louis Railway Company, Appellant, by Bluford Wilson and Philip Barton Warren, his attorneys, and says that in the record and proceedings, and in rendering the decree aforesaid, there is manifest error in this, to-wit:

1. The Court of Appeals erred in affirming the decree of the Circuit Court adjudging the petitioner to be entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway and property.

2. The Court of Appeals erred in failing and refusing to reverse the decree of the Circuit Court.

Wherefore the said C. H Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, prays that the judgment and decree of the United States Circuit Court of Appeals for the Seventh Judicial Circuit, and of the United States Circuit Court for the Southern District of Illinois, be reversed, and this cause be remanded with directions to dismiss the intervening petition.

Bluford Wilson
Philip Barton Warren

Solicitors for C. H. BOSWORTH,
Receiver Chicago, Peoria & St. Louis Railway.

2042

Supreme Court of the United States

October Term, 1897

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,
Petitioner.

vs.

THE CARR, RYDER & ENGLER COMPANY,
Respondent.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

Pursuant to an order duly entered in the United States Circuit Court for the Southern District of Illinois, in a cause therein pending wherein the Mercantile Trust Company, et al, were complainants and the Chicago, Peoria & St. Louis Railway Company, et al., were defendants, C. H. Bosworth was appointed receiver of all of the property of said defendant railway company, and immediately took possession thereunder, and from that time until the first day of February, 1896, he was in the possession and operation, as such receiver, of the railroad and property of said defendant railway company.

On the 21st day of February, 1895, the Carr, Ryder & Engler Company, by its solicitors, filed its intervening petition in the said cause of the Mercantile Trust Company against the Chicago, Peoria & St. Louis Railway Company; that in and by said intervening petition, it was alleged that the petitioner was a corporation existing under and by virtue of the laws of the State of Iowa, with its principal office at the city of Dubuque; that on the 20th day of October, 1894, the petitioner delivered at Dubuque, Iowa, to the Chicago, Milwaukee & St. Paul Railway Company, a quantity of manufactured doors, sash, blinds, etc., for the purpose of having the same transported by the said railway and connecting lines of railroad, from Dubuque, Iowa, to Birmingham, Alabama; that on the 24th day of October, 1894, the said doors, sash, blinds, etc., were loaded into a car of the Chicago, Rock Island and Pacific Railway Company, number 1004, and consigned to the May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis, Illinois; that said property was of the value of $777.28; that said car was transported by the said Chicago, Milwaukee & St. Paul Railway Company to Rock Island and delivered to the Rock Island & Peoria Railway Company, and by said last named company transported to Peoria, and there delivered to the Chicago, Peoria & St. Louis Railway Company, to be transported by it to East St. Louis,

and there to be delivered to the next connecting line of railroad, and so on to its destination; that said Chicago, Peoria & St. Louis Railway Company received said car and transported the same as far as East St. Louis, a station on its line of railroad, and while the same was still in transit and on its way to destination, and in the possession and under the control of said Chicago, Peoria & St. Louis Railway Company, the said car and property were destroyed by fire on the evening of the 28th day of October, 1894, and that the petitioner suffered damage to the amount of the value of said sash, doors, blinds, etc., namely, $777.28.

Said intervening petition further alleges the appointment of C. H. Bosworth as receiver of the Chicago, Peoria & St. Louis Railway, and that at the time he was operating said property, the liability of such railway company to the petitioner was incurred; and is of such a nature as entitles it to a priority over debts and demands secured by the mortgages

To this intervening petition, C. H. Bosworth, as receiver, filed his answer on the 11th day of March, 1895, in which he denied that at the time said car and contents were destroyed by fire, they were in his possession, custody or control; and further answering the said receiver alleged that after the said cars had been delivered to him, and before their destruction by fire, they were delivered to the Terminal Railroad Associa-

tion of St. Louis; that at the time of their destruction by fire, they were in the sole custody, care and control of said Terminal Railroad Association, under a certain agreement between the Chicago, Peoria & St. Louis Railway Company, and the said Terminal Railroad Association, by which the latter contracted to give to the former terminal facilities at East St. Louis and to handle and care for its freight, including the property mentioned; and further answering, alleged that the property mentioned in said intervening petition, was in the care of the said Terminal Association in the course of a regular interchange of business with that Association, in accordance with the custom that had been in force for the past four years, by which it became and was the duty of said Terminal Association to exercise due care and caution in the safe keeping and handling of said cars and freight, while in the custody and control of the same; and further alleging, that the Terminal Association wilfully and negligently, stored the said property in close proximity to a certain lot of bailed hay, which hay was fired by sparks from a certain passing switch engine belonging to the said Terminal Association, which fire was communicated to the property mentioned in said intervening petition; and further answering alleged, that in addition to the property described in said intervening petition, more than forty cars and their valuable contents were either wholly destroyed

or damaged; further answering, the receiver denied that the petitioner was entitled to the relief, or any part thereof, demanded.

On the 27th day of August, 1897, for the purpose of saving the labor and expense of making proof, it was stipulated by the parties that the said Carr, Ryder & Engler Company is a corporation, as alleged, having its place of business at the city of Dubuque, Iowa; that on the 20th day of October, 1894, it delivered to the Chicago, Milwaukee & St. Paul Railway Company, at Dubuque, the property mentioned in its petition, consigned to the May & Thomas Hardware Company, at Birmingham, Alabama, by way of East St. Louis, and was loaded in a car of the Rock Island & Pacific Railway Company, No. 1004, and was to be transported to destination, pursuant to the bill of lading issued therefor, which bill was attached to the stipulation; that while said property was in transit it was destroyed by fire at East St. Louis on the evening of the 28th day of October, 1894; that at the time it was destroyed the petitioner was the owner, and that the property was of the value of $777.28; and petitioner was damaged in that sum, and shall be entitled to recover that amount, if it shall be adjudged that it is entitled to recover in this proceeding.

After the facts were stipulated to as above set out, both parties proceeded to the taking of testimony as to the question of whether or not at the time the

loss occurred, the property was in the possession of your petitioner, as such receiver. On this point the evidence shows that, after your petitioner received said car at Pekin, Illinois, he hauled the same to a point immediately beyond the terminus of his own rails at East St. Louis, and placed said car on certain "Y" rails of the Terminal Railroad Association, reaching that point about 3 o'clock on the afternoon of October 28th, 1894; that the servants of the Terminal Railroad Association of St. Louis, in the usual course of employment by that company, then hauled the car to a certain customary halting place on the premises of their employer; using for the purpose an engine which belonged to their employer; here they left said car stationary, until the evening of that day, when it was destroyed by fire; and that in the usual course of business the Terminal Association, after obtaining from the receiver a way-bill or memorandum, indicating the ultimate destination of said car, would have hauled the same over its own rails in East St. Louis, or over rails subject to its control for that purpose, and delivered the same to a carrier on whose rails the transit south was to continue.

The evidence further showed that the Terminal Railroad Association in fact took, and at the time of the loss, had the actual physical custody and care of the property; that the haul over the tracks of the Terminal, from the point where the receiver's servants parted from

the car, to the point where the loss occurred, was a portion of the transit to be made in any case, no matter what the ultimate destination of the car might be; that for the purpose of moving the car thus far the information as to the ultimate destination, which a way-bill would have given was not needed; that no way-bill had up to that time been delivered, but that it does not appear that the lack of the information contained in such way-bill contributed in any way to the loss; that it further appeared that in the carrying business conducted by the Terminal Association the car in question would remain stationary for a time, and thereafter be hauled, probably with other cars, grouped for the purpose, to the starting place of the carrier who was to take it south; that information as to the ultimate destination and route had not as yet been actually imparted by the receiver to the Terminal Association, but that the latter was content for the time being, to treat such information, then in the possession of the receiver, as sufficiently available to itself.

On the 10th day of April, 1896, the Master in Chancery, to whom said intervening petition was referred, filed his report, in which he found that the said car and its contents were held by the receiver as a common carrier at the time of its loss; and that the intervener had a just claim against said receiver in the sum of $777.28.

On the the 27th day of April, 1896, the receiver filed his exceptions to the said master's report; that the same were overruled, and said report approved on the 3d day of March, 1897; that on the 5th day of April, 1897, a decree was entered by the United States Circuit Court for the Southern District of Illinois, affirming the said master's report and ordering said receiver to pay to intervening petitioner the said sum of $777.28 with interest.

On the 5th day of April, 1897, the receiver prayed for, obtained and perfected an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the said decree of the United States Circuit Court for the Southern District of Illinois, and duly assigned his errors on the record.

Said appeal came on for hearing in said Circuit Court of Appeals before their Honors, Judges Woods, Jenkins and Showalter, and was argued in said court, and subsequently, on the 25th day of February, 1898, the said Circuit Court of Appeals handed down its decision wherein and whereby the said decree of the United States Circuit Court for the Southern District of Ilinois was affirmed, his Honor, Judge Showalter, dissenting therefrom; a copy of which opinion is attached to the transcript of record certified to this court.

Thereafter, on or about the 25th day of March, 1898, the receiver filed his petition in said Circuit

Court of Appeals for a rehearing, which petition was subsequently on or about the 1st day of April, 1898, overruled, a copy of which petition is also attached to the transcript of record certified to this court.

A great number of intervening petitions were filed in the foreclosure cause pending in the United States Circuit Court for the Southern District of Illinois, for claims arising out of this same fire; that the Master in Chancery of the Circuit Court found him liable in each and every of the cases; that for the purpose of avoiding the expense of an appeal in each and every case, it was agreed between counsel that four different cases should be appealed, and stipulations were entered into that the other cases should abide the result of those cases thus appealed; that of the other cases appealed all three involved shipments of barley to grain brokers, for sale on the grain exchange in St. Louis; that in the trial it was shown that an agreement existed between these grain brokers and the Terminal Railroad Association, by which the latter was to hold such barley in store on its tracks in East St. Louis until the same could be sold; that by reason of this agreement, among other things, the Circuit Court of Appeals reversed the decree of the Circuit Court entered in the three other appeals; that all four of these appeals were submitted to and were considered by the Court of Appeals at one hearing and one opinion rendered to cover all; that in that opinion

the court of appeals declared that inasmuch as the agreement as to barley had no application to the Carr, Ryder & Engler case, the decree of the Circuit Court in favor of that company was right; the Court of Appeals was of the opinion that though in the physical possession of this particular car, (in the case at bar) the Terminal Association had not become responsible as a carrier therefor, because it had not been put in possession of a way-bill or other form of information on which it could proceed with the carrying.

Argument.

The questions presented by this application are: *First*, is this a proper case for the exercise of the power of this court in certiorari.

If this is determined in the affirmative, then, *Second*, did the Court of Appeals for the Seventh Circuit err in holding, notwithstanding the fact that pursuant to custom and agreement the appellant had deposited the car in controversy on the certain designated "Y" of the next connecting carrier, and that carrier had taken actual physical possession and control of the same, the appellant was still liable as a common carrier, for the same, for the simple reason that it had not forwarded to the connecting carrier a way bill showing the ultimate destination of the car.

I.

This is a proper case for the issuing of a Writ of Certiorari.

The act of Congress, approved March 3d, 1891, creating the Circuit Court of Appeals, expressly provided, by its Sixth section, for a review by the Supreme Court, in the following language:

> "And excepting, also, that in any such cause as hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

In the very late case of *Forsythe v. City of Hammond*, (decided April 9th, 1897), the Supreme Court, in response to a contention of lack of power to take cases by certiorari, said of this section of the Act that:

> "The general language of this clause is noticeable. It applies to every case in which, but for it, the decision of the Circuit Court of Appeals would be absolutely final, and authorizes the court to bring before it for review and determination the case so pending in the Circuit Court of Appeals, *and to exercise all the power and authority over it which this Court would have in any case brought to it by appeal or writ of error.* Unquestionably the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. * * * * All that is essential is that there be a case pending in the Circuit Court of Appeals, and of those classes of cases in which the decision of that

> court is declared a finality, and this court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination."

Fully appreciating the fact that "a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the Court of Appeals," we shall endeavor to show that the case at bar comes within the narrow limits early prescribed by the Supreme Court for the exercise of this power.

In *ex parte Lau Ow Bew, 141 U. S.. 583*, this court announced that one of the grounds upon which it would exercise this power was in cases in which the question involved was one of gravity and importance. And in *Forsythe vs. City of Hammond, supra*, it said:

> "That while this power is co-extensive with *all possible necessities* and sufficient to secure to this court *a final control over the litigation in all the Courts of Appeal*, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, *the necessity of avoiding conflict between two or more Courts of Appeal*, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

The circumstances which we contend to exist to warrant the exercise of this power are, (1), the importance of the questions involved, and (2), the conflict of the decision of the Circuit Court of Appeals for the Seventh Circuit and the decisions of this Honorable Court.

(a) The importance of the questions involved justifies a review by this court.

Two of the grounds upon which the Court of Appeals bases its decision in this case, involve the question (1) of delivery of freight between connecting carriers, and (2) whether a terminal or switching railroad shall be considered a common and connecting carrier.

The first of the above questions upon its face imports gravity and importance, since the commercial and shipping interests of this nation are large, and for their protection and guidance demand that the principles of law applicable thereto shall be as definitely as possible announced.

The second of the above questions becomes highly important when it is remembered that in and about all large cities, or centers of industry, there are terminal and switching railroads, which the interchange of traffic demand for the purpose of facilitating the transportation of freight in bulk between the common carriers which reach the proximity of said cities. Every day there are large numbers of cars which are being handled by such switching and terminal railroads, and therefore the question as to the character of the liability assumed by such terminal and switching railroads, when they are in the actual physical possession and control of such freight, becomes important for the guidance, not only of common carriers, but of the

whole commercial interests. This question has never been definitely and directly passed upon by this honorable court.

(b) The necessity for unanimity in the decisions of the Federal Courts also justifes a review by this Court.

In addition to the importance of the questions involved, we have here a conflict in the decisions of the Court of Appeals and this Honorable Court, which has been recognized as a most potent reason for a review by this court. *Forsythe vs. City of Hammond, supra.*

In the case at bar the Circuit Court of Appeals, after recognizing that the car in question was in the actual physical possession and control of the Terminal Railroad Association, having been placed on its rails, pursuant to a custom, and at a designated place, and the said Terminal Railroad Association had hauled it to a customary halting place on its own rails, then held that by reason of the appellant not having forwarded the way-bill, which contained informatian as to the ultimate destination of the car, the appellant had not made such a delivery as was sufficient to divest him of his common law liability.

This is in direct conflict with the decision of this Honorable Court in *Pratt vs. Grand Trunk Ry. Co., 95 U. S., 43*, where it is held that if by custom or agreement there is a designated place of deposit between

two connecting carriers, delivery is made by such deposit, although shipping directions had not as yet been given from the first to the second carrier.

II.

Delivery pursuant to custom or agreement is sufficient.

If this court is of the opinion that this case is a proper one for review, the question which then presents itself is, can delivery to a connecting carrier be made only by communicating complete and ultimate shipping directions to the succeeding carrier, or is a sufficient delivery made when the connecting carrier takes actual physical possession for the purpose of hauling the car a certain distance on its rails, and there, pursuant to long establised custom, to await the coming of the information as to the ultimate destination?

It is not necessary to antagonize the general rule that a railroad cannot divest itself of a carrier's liability by delivering to the next connecting carrier, unless such delivery is accompanied with the necessary shipping directions for the further transportation of the goods, to sustain the exceptions to it which have their foundation in custom and agreement.

(a) **At common law a carrier is not bound to carry beyond his own rails.**

By a reference to the bill of lading in this case (R. p. 44) it will be seen that there was no express contract of carriage between the shipper and this receiver, and therefore the only contract in existence is that which is implied in the common law by his acceptance of the goods for carriage. That such a contract is one simply to safely carry and deliver to the next succeeding carrier. hardly needs the citation of authorities to sustain. His duty is fulfilled when he has done that, and so in the very beginning we see that he was under no obligation to carry this car beyond his own rails.

Michigan Cent. vs. Mineral Springs, 16 Wall 324;
Atchinson Ry. vs. Denver Ry., 110 U. S. 667;

There is no question in this record but that this car had been hauled the entire length of the receiver's rails, which terminated at Bridge Junction and deposited it on the rails of the Terminal Association; but it is contended that, inasmuch as the receiver had no terminal facilities at East St. Louis, a point beyond his line. that the receiver was bound to provide such facilities, and having entered into a written agreement with the Terminal Association by which the latter was to handle and care for freight coming from the receiver's road and going through or to that place, such agreement made the rails of the Terminal the

receiver's rails. The construction of this agreement we will discuss later; we simply desire now to assert the proposition that the receiver was under no obligation, by express or implied contract, to furnish to this shipper on account of this shipment such facilities beyond his own rails in East St. Louis.

(b) This shipment was set to a designated place of deposit.

Independent of the written agreement referred to, the record shows that the car in question was hauled by the receiver to a point on a certain "Y" belonging to the Terminal, where according to the custom existing between the two carriers, the latter sent its own servants with its own engine and took physical possession of the same, (R. p. 214, 219, 231.) In addition to this it was the custom of the Terminal to immediately take a record of all such cars deposited on this "Y," (R. p. 75, 83, 98) as having been delivered to it on the day of their arrival, and not to wait until it received a way-bill before making a record of such delivery. (R. p. 114.)

When it is considered that the contract under which the receiver was acting in no way obligated him to carry this shipment beyond his own rails, and the record shows that he carried it to the end of his rails and deposited it at a certain place, designated by custom, on the rails of the connecting carrier, which took *actual physical possession* of it, we submit that a

prima facie case of delivery has been made, notwithstanding no ultimate shipping directions had been forwarded.

In support of this we rely on the law, as laid down by this Honorable Court in the case of *Pratt vs. Grand Trunk Railway, 95 U. S., 43.* There the goods had been shipped from Liverpool to St. Louis in packages marked "P. & F. St. Louis." They were carried by the Grand Trunk Railway to Detroit, where they were destroyed by fire, under circumstances almost identical with the facts in the case at bar, a delivery was held to have been made to the connecting carrier. In the opinion of the court it is said:

> "At the time the fire occurred the defendant had no freight room or depot at Detroit, except a single apartment in the freight depot of the Michigan Central Railroad Company. Said depot was a building several hundred feet in length, and some three or four hundred feet in width, and was all under one roof. It was divided into sections or apartments, without any partition wall between them. There was a railway track in the center of the building, upon which cars were run into the building to be loaded with freight. The only use which defendant had of said section was for the deposit of all goods and property which came over its road, or was delivered for shipment over it. This section, in common with the rest of the building, was under the control and supervision of the Michigan Central Railroad Company, as hereinafter mentioned. The defendant employed in this section two men, who checked freight which came into it. All freight which came into the section was handled exclusively by the employees of the Michigan Central Railroad Company, for which, as well as for the use of said section, said defendant paid said company a fixed compensation per hundred weight. Goods which came into the section from defendant's road, destined over the road of the Michigan Central Railroad Company, were, at

the time of unloading from defendant's cars, deposited by said employees of the Michigan Central Railroad Company in a certain place in said section, from which they were loaded into the cars of said latter company by said employees when they were ready to receive them; and, after they were so placed, the defendant's employees did not further handle said goods. Whenever the agent of the Michigan Central Railroad Company would see any goods deposited in the section of said freight building set apart for the use of the defendant, destined over the line of said Central Railroad, he would call upon the agent of the defendant in said freight building, and, from a way bill exhibited to him by said agent, he would take a list of said goods, *and would then, also, for the first time learn their ultimate place of destination*, together with the amount of freight charges due thereon; that from the information thus obtained from said way bill in the hands of the defendant's agent, a way bill would be made out by the Michigan Central Railroad Company for the transportation of said goods over its line of railway, and not before.

These goods were, on the 17th of October, 1865, taken from the cars and deposited in the apartment of said building used as aforesaid by the defendant, in the place assigned as aforesaid for goods so destined.

At the time the goods in question were forwarded from Montreal, in accordance with the usage in such cases, a way bill was then made out in duplicate, on which was entered a list of said goods, the names of the consignees, the place to which the goods were consigned, and the amount of charges against them from Liverpool to Detroit. One of these way bills was given to the conductor who had charge of the train containing the goods, and the other was forwarded to the agent of the defendant in Detroit. On arrival of the goods at Detroit the conductor delivered his copy of said way bill to the checking clerk of defendant in said section, from which said clerk checked said goods from the cars into said section. It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier."

In commenting on this case, and in applying the rule of law there laid down to the facts in the case at bar, his Honor. Judge Showalter, in his dissenting opinion, filed in the Court of Appeals, (R. p. 402) says:

> "It will be seen from the foregoing statement that on the course of dealing between the two carriers, *shipping directions had not been received by the connecting carrier.* The court mentions the mark on the goods, but not as a controlling factor in the decision. The Michigan Central Railroad Company did not look at the marks on the goods for the shipping directions upon which it acted. Under the mode of dealing between the two carriers, the case was the same as though they had been no marks on the packages. The goods were on the platform of the connecting carrier at the time of the loss. The defendant did not own or have any possessory right over that portion of the connecting carrier's station-house. Defendant's servants were not privileged either to unload the goods there or to handle the goods afterwards. The servants of the connecting carrier placed all goods which were to be forwarded as designated by the agent of the defendant at a particular locality on the platform in question. The defendant ceased to be and the connecting carrier became the bailee of the goods—*and this before the shipping directions had been given by the one carrier to the other according to the understood mode of dealing between them.* This was a case in which the defendant did not own or possess the unloading platform. If the defendant had owned or possessed that section of the station where the goods were unloaded, the mere placing of the goods in controversy at a particular locality on the platform, from which the servants of the connecting carrier would afterward, without special license from the defendant, take them, would not have changed the custody of such goods. The law upon this point is clear. Nor would the connecting carrier have become bailee even if its agent had received the shipping directions before the destruction of the goods. The fact that the goods were still in the custody of the defendant would from the standpoint of the shipper, have determined the matter. I may add that the Grand Trunk Railway Company had no terminal, that is to say, unloading facilities at Detroit,

so far as concerned the owner of the goods in question. The section of the station in which the freight of the Grand Trunk Railway Company was unloaded was owned and possessed by the connecting carrier. In the case at bar the connecting carrier not only took exclusive possession of the cars in controversy at the terminus of appellant's rails, but hauled them to a point on its own rails to which appellant had, neither in law nor by contract, even a right of access."

III.

Issuing of way-bill by the Receiver to the Terminal Association was not necessary to constitute delivery.

It was contended in the court below, that notwithstanding the *actual physical* delivery to the Terminal Railroad Association, yet the receiver was responsible for the cars and contents up to the time he issued a new way bill for them, and passed that way-bill on to the Terminal Association: Our reply is, that:

(a) Such way-bill is simply evidence of delivery, which may be shown by other competent evidence.

Therefore we insist that it is wholly immaterial and technical to object that, prior to the fire, no way-bill covering the ultimate destination had been passed over to the Terminal Company. At most, such way-bill or bill of lading is simply *evidence* of a delivery

and does not in itself constitute the delivery, and if actual and physical delivery has been made, *it can be established by other evidence.*

For a court of equity to sustain the contrary contention, it will be compelled to ignore the actual physical delivery and require a technical one. Even courts of law have not done this.

In the case of *Illinois Central vs. Smyser, 38 Ill., supra*, where goods had been placed in a car of the Railroad Company, with its assent, for the purpose of shipment, the loaded car being under the exclusive control of the company, the court held that the goods thereby passed into the possession of the company as effectually as if they had been delivered in its warehouse. In the opinion of the court it is said:

> "*The said track and cars belonged to the company and are under their exclusive control*, and there is no question that the company placed this car at a point opposite the wharf boat on which the cotton was stored, for the express purpose of having it transferred from the boat to the car, that they might transport it to the point desired by the shipper. *The company had the exclusive use and control of their road, said tracks, and their cars;* no use could be made of them without the consent of the company. They had the right to permit their cars to stand at the point at which this one was placed. The company at any moment, at least after the car was loaded, had the unquestioned right to remove it to any other part of their road, but the commission merchant had no such right, even if he had possessed the means. He simply had the right to load the cotton on the car."

Applying the evidence in that case to the facts in the case at bar, the court must be struck by their

mutual similarity. There is no question but what the tracks upon which these cars stood, at the time of the loss and damage, belonged to the Terminal Railroad Association and were under its exclusive control. Concede, if you please, that these cars were being handled under the contract referred to between the Terminal Railroad Association and the old Chicago, Peoria & St. Louis Railway Company in the evidence; that contract contained no provision by which the Terminal Railroad Association gave up any right to its exclusive control over these tracks. On the contrary, the Terminal Railroad Association always sent its own engines up to the "Y" tracks, and hauled the cars down to their yards, not even permitting the engines of the railway company to come upon its tracks.

It was also attempted in the evidence to show that the Terminal under this contract set apart certain tracks for the use of the Chicago, Peoria & St Louis Railway Company, but this wholly failed, inasmuch as it was established by a preponderance of the evidence that the Terminal Railroad Association used the tracks indiscriminately for other customers, and even went so far as to rent out and convert a warehouse, which was situated in their midst, into a veritable fire trap. (R. p. 199-202-212-213).

Again, using the same language of the Court in the *Smyser case, supra:*

> "They (the Terminal Railroad Association) had the right to permit their cars to stand at the point at which

> this was placed. The company (the Terminal Railroad Association) at any moment, at least after the car was loaded—(these cars were loaded) had the unquestioned right to remove it to any other part of their road, (yard) but the commission merchant (the receiver) had no such right, even if he had possessed the means. He simply had the right to load the cotton in the car.

The receiver simply had the right to deposit the cars at the terminus of his road in such a way as to permit the Terminal Railroad Association to atttach its engines thereto.

Continuing, the court in the *Smyser case, supra*, says:

> "The wharf boat, on the contrary, with its contents, was in the possession of the commission men, and the cotton so continued until it was placed in the cars. It then passed into the possession of the company as undoubtedly as if it had been delivered in their warehouse, no doubt for the mutual convenience of all parties. And this, too, with the assent of the company, to promote their interest in the transaction of the business for which it was created."

Now as to the assent of the Terminal Railroad Association, we admit the same is necessary to complete a delivery. On that point can it be contended for a moment that its assent is not to be presumed from the fact that it sent its engines up to the "Y" tracks, broke up the receiver's train, attached to the cars and hauled them down into their own yards and on their own tracks, and there deposited them. Can it be contended that the Terminal Railroad Association's assent is not to be presumed or implied from

the fact that it attached its engines to the cars, and by its own servants hauled them to a certain point on its own rails.

And so the court in the *Smyser case*, says:

> "No difference is perceived in receiving freight on the platform of their depot and into their cars at any place on their road or side track; or whether it is placed there by their own employes or by other persons, *so it is done with the assent of the company.*"

Now in that case the same contention was made as to a bill of lading not having been made out, as in the case at bar a way-bill for these cars had not been delivered to the Terminal Railroad Association. On that point, the court said:

> "*It is not the simple signing of a bill of lading which transfers the possession of freight to the company*, but it is evidence that they have received possession. *Their possession may be shown by any other legitimate evidence.* The bill of lading of a common carrier is fixed by accepting the property to be transported. If, however, goods are placed on his boat or car, without his knowledge, *or that of his agent*, he is not liable. *Angel on the Law of Carriers, Sec. 140*, says: 'When the person having the custody of the goods to be shipped never parts with their possession or places them under the control of the carrier, there is no bailment, and consequently no liability incurred.' *Ibid.* But in this case the company by their acts accepted the trust. The cotton was not placed in the car without their knowledge, but it was with their express assent. Had the employees of Williamson, Haynes & Company placed the cotton on the platform of the depot without the assent of the company to be transported, no one would doubt their liability; and yet in principle no difference is perceived."

We, therefore, insist that by the act of the Terminal Railroad Association attaching its engines to the

cars and depositing them on their own tracks, it knew the car was in transit, and according to the established custom, hauled the car to a certain point on its own rails, and was there content to hold it until the way-bill came in the usual course of business.

To show how utterly immaterial this act of delivering a way-bill or sending a junction report is to the actual delivery of the cars, let us place the "shoe on the other foot," and ask the question: "If there had been a new way-bill issued but no actual physical delivery of the cars, would this court hold the party to whom the way-bill had been issued responsible for the care, custody and control of the cars?" The answer to this is found in *Missouri Pacific vs. McFadden, 154 U. S., 155*, where the court said:

> "All of these allegations in the answer were, of course, admitted by the exception, and, therefore the case presents the simple question of whether the carrier is liable on a bill of lading for property which, at the time of signing of the bill, remained in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated. The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry.

Continuing further the court, quoting from *King vs. The Lady Franklin, 8 Wall, 325*, speaking of a bill of lading says:

> It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property

> on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. *The receipt of the goods* lies the foundation of the contract to carry and deliver. If no goods are *actually* received, there can be no valid contract to carry and deliver."

And continuing, the court thus characterizes that rule:

> "The rule thus stated is the elementary commercial rule. Indeed, in the case last cited this court expressed surprise that the question should be raised. This view coincides with the rulings of the English Courts."

IV.

The Agreement with the Terminal Association was not a Lease by which the Receiver's Rails were extended into East St. Louis.

Opposing counsel sought to meet the prima facie case of delivery thus made by the receiver, by construing the agreement which existed between the Terminal and the receiver as a lease of the rails of the former to the latter, and upon this base their argument that the car, at the time of its destruction, was still in the possession of the receiver.

We desire to recur to the fact that the rails of the receiver terminated at a station called Bridge Junction, and did not extend south of the road marked "Stockyards Avenue" on the plat opposite page 112, in the record. Opposing counsel have assumed from

the statement in the first clause of this agreement that the Terminal Association "undertakes to give the party of the second part terminal facilities at East St. Louis," that the receiver had no terminal facilities at the terminus of his line. This assumption is unwarranted by the facts. In connection with this shipment it was not considered necessary to show that the receiver had terminal facilities at the end of his line, since this shipment was a through shipment, and not expected to be handled in the receiver's yards at the terminus of his rails, but from the first was intended to be "set to" the tracks of the Terminal Association, as the next connecting carrier. Therefore no direct evidence of terminal facilities were introduced. However, by a reference to the "plat of railway yards" in this record (R. p. 112) it will be seen at the bottom of the plat, and toward the middle, the beginning of yards marked "J. S. E. freight yards."

"J S. E." was the common name by which the railroad operated by the receiver had theretofore been known. (R. p. 21.) This identity is also shown by the fact that the line of railroad belonging to the C., P. & St. L, Railway is designated on this plat as the "Jacksonville Southeastern R R." These "J. S. E. freight yards" are referred to and identified by the testimony of the receiver himself. (R. p. 231) and opposing counsel tried hard to get him to say that he had no terminal facilities but did not succeed. Therefore,

this agreement was not entered into for the purpose of supplying any deficiency in the line of railroad which the receiver was operating for the purpose of complying with his common law obligations as a carrier.

The agreement was simply for the purpose of securing a certain and definite rate to be paid to the Terminal Association for switching through cars to and from the rails of the receiver and other companies in the vicinity of East St Louis, and to provide beforehand for the ample and quick handling of such through freight, so that the receiver's own terminal facilities would not become clogged or over-taxed by the accumulation there of such through freight in addition to that which was purely local and destined only to East St. Louis.

In this connection it is well to consider the nature of the railroad of the Terminal Association, and the character of the business that it solicited and carried on. By a glance at the plat (R. p. 112) it will be seen that the rails of the Terminal connect with all of the many railroads centering in East St. Louis; this taken with the name of the Association points directly to the fact that it is a switching railroad, which serves all other railroads centering in East St. Louis by delivering cars from one to the other.

As a matter of fact, it could have been shown that the Terminal Railroad Association has the same sort of an agreement with every other railroad entering East St. Louis, as it has with the receiver.

Unless, therefore, it can be said that the mere fact of the Terminal Association being a switching railroad, whose main business is simply the switching of cars from one railroad to another, prevents it from assuming the character and liability of a connecting carrier for the cars while they are in its possession in the course of such transportation from one railroad to another, then we submit that the existence of such an agreement, as that of August 1, 1892, does not in itself change the relations between the Terminal Association and other railroads, from which it receives cars.

In *Missouri Pacific R. R. vs. Grocery Co.*, 55 Kan. 525, we find a logical statement of the reason why the mere fact that a railroad is a switching railroad does not relieve it of the liability of a connecting carrier. In that case a car load sugar sent from Louisiana was consigned to the plaintiff, a grocery company at Wichita. It was shipped over the Texas & Pacific Company's line, and was brought to Wichita by the St. Louis & San Francisco Company. It was there place on the "Y" and switched by the defendant company over its tracks to the spur track in the rear of the plaintiff's warehouse, for which service the St. Louis & San Francisco Company paid their regular switching charge of two dollars per car. The court held that the defendant was liable as a common carrier for a loss

occurring after it had taken charge of the shipment, and before the plaintiff had had reasonable time in which to remove it, among other things saying:

> "A railroad transporting a passenger or a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train. The fact that compensation for this particular service was paid by the St. Louis & San Francisco Railroad Company, while it might render that company also responsible, it could not relieve the defendant company from its liability as a carrier."

To sustain the contention that the agreement of August 1, 1892, excluded the relation of connecting carriers between the two companies, or that the contract itself made them respectively principal and agent as to the interchange of all traffic between them, it is absolutely necessary to ignore the fourth provision of the contract which is: (R. p. 111.)

> "Fourth. All cars consigned to and from the East St. Louis freight house of the party of the second part, to be switched to and from the Wiggins Transfer tracks without extra charge. Regular switching charges and rules to apply to all other cars to and from connections, the party of the first part to be governed in making its collections by instructions shown on bill to it, as to who should pay. In the absence of any instructions the switching charges will follow the car."

This clause expressly recognizes and provides for that interchange of traffic which occurs between connecting carriers, and contemplates the existence of that relation in just such a case as the one at bar. By that clause provision is made that the regular

switching charges and r
cars, to and from conne
switching charges shall
one in question, which
the tracks of the Termi
of other railroads conne

rules shall apply on all other
ections; that is, that the regular
l apply to such a car as the
necessarily had to pass over
inal Association to the tracks
ecting with the latter.

According to the c
the two companies, such
were placed upon the de
Association, and when t
thus placed, it knew tha
over its rails to the rail
for that purpose it took
employes and attached
hauled them to a point
convenient for it to hol
mate shipping direction
tion, so that it would kn

custom which existed between
h cars as the one in question,
esignated "Y" of the Terminal
the latter company found cars
at they were to be transported
ls of some other railroad, and
possession of them by its own
l its own engine to them and
on its own rails, where it was
d them until it received the ulti-
s, namely, the ultimate destina-
ow to which railroad to set it.

Now it is to be rem
not provide that *certain*
territory in the yards o
to be set aside for the
in the sense that he was
or have any possessory

nembered that this contract does
yards or *any special* place or
f the Terminal Association are
e *exclusive* use of the receiver,
s to exercise any dominion over
right therein. Nor does the evi-
dence in fact show that
yards were set aside f

any particular portion of the
for the *exclusive* use of the re-
ceiver.

John Weidmer, of the Gratiot Street Warehouse Company, testified that he rented of the Terminal Association a warehouse which was right in the middle of that part of the Terminal's yards, which opposing counsel refer to as the appellant's "portion" of these yards; that some of the tracks ran through the warehouse; and that he rented from the Terminal on the understanding that it had full control. (R. pp. 212, 213.)

The servants of the Terminal Association may have been accustomed to haul cars from the receiver's road to some special territory in the yards of the Terminal, and that territory may for the time being have been "the yards set aside for the use" of the receiver, within the sense of the second section of the contract, *but such servants did not do this by any direction from the receiver;* nor was any right in him to direct or control them, or to designate the place on the grounds, or rails of the Terminal Association where any car received from his road should be at any given time in any way recognized. (R. p. 197-201) *This was the construction given to the contract and acted on by the parties.*

The agreement will be searched in vain for words of conveyance. There can not be found in it any transfer of any estate in the grounds or tracks, or any part thereof, or of any possessory interest in its engines, or control over its servants, from the Terminal Association to the receiver.

The conduct of the Terminal Association at the very fire which caused this great loss emphasizes the absence of any attempt on the part of the Terminal to make any such transfer by this agreement. As soon as the fire broke out, the receiver had an engine close by on his own rails, and his employees attempted to go in and hitch on to these cars and pull them away from the burning warehouse, but were prevented from so doing by the employees of the Terminal (R. p. 193). The evidence further shows that while a great many of the cars which came off of the receiver's road were set on to certain tracks by the Terminal Association, yet it further shows that this was not always the case, and that the Terminal would take the cars to any part of its vast yards which was most convenient to it, and there mingle them with cars from other railroads, and that after the Terminal had taken possession of such cars on the designated "Y," the receiver could in no manner direct the point to which they were to be transported on the rails of the Terminal. (R. p. 197-201). In other words, the evidence conclusively shows that the receiver had no use, direction or control over any portion of the Terminal yards.

Therefore we earnestly submit that the contract in question is nothing more than the result of precautionary measures on the part of the receiver for the prompt and adequate handling of *through* freight by

his connecting carrier, the Terminal, and *beyond this* is nothing more than a *division of the freight charge between the two connecting carriers.* As his honor, Judge Showalter, in his dissenting opinion filed in the Court of Appeals, said (R. p. 397):

> "As said above the shipper pays no more than if the appellant had himself owned and operated the lines of the Terminal Association. Such a contract could not interfere with or modify the legal obligation of either carrier to a shipper whose goods are handled successively by both. Neither appellant nor the Terminal Association could evade or alter any legal obligation to a third party by any contract between themselves. If the Terminal Association had alienated to appellant an actual ownership or possessory right over that portion of its tracks where the cars in controversy were destroyed, and such a control over its employees and engines, that said employees when engaged in handling the cars in question were the servants of appellant, and the engine used by them, his engine, for the time being, the case would be different. On this hypothesis, the tracks where the cars were destroyed would have been appellant's track's, the employees who hauled the cars to that point his servants, the engine used by them his engine, he would have continued to be the bailee of the property, and the matter of way bills or junction reports would have signified nothing. But in my judgment, as said, *the contract in question had no force as of alienation* by the Terminal Association to appellant of any possessory right, interest or estate in or over any property of the former company, or of any control over its servants. Neither the relation of lessor and lessee, nor that of licenser or licensee existed between these parties as resulting from said contract so far as it concerned the cars and contents in question."

V.

The Agreement between the Receiver and the Terminal did not make them principal and agent.

It was also argued in the courts below that the agreement of August 1, 1892, between the Terminal Railroad Association and the Chicago, Peoria & St Louis Railway Company made the former the agent of the latter. In the opinion of his honor, Judge Jenkins, it will be seen that he also is inclined to this view.

From an inspection of this agreement (R. p. 111) it will be found that the Terminal Railroad Association only agreed to furnish necessary yard room and track facilities in their yards at East St. Louis for the purpose of handling such freight which might originate on the line of the Chicago. Peoria & St. Louis Railway Company, or be received by that railway company from other lines to be carried to St. Louis or points beyond St. Louis over the rails of the Terminal Association. For this service the Terminal was to receive the customary charges for the handling of each car, just as any other connecting carrier would receive.

A case which is analogous to the one at bar is *St. Louis Insurance Company vs. St. Louis, Vandalia, Terre Haute & Indianapolis R. R. Co., 104 U. S., 146.*

There this court held that an arrangement between a Dispatch Company and sundry railroad companies, whose lines terminated at New York, whereby the latter, separately, agreed to carry all goods for the transportation of which the former should contract, at the established tariff rates, did not involve a joint liability on the part of the railroad companies, nor make the Dispatch Company the agent of the railroad companies, the court sayimg:

> "The Dispatch Company and the defendant had, it is true, certain business relations, but those relations did not necessarily involve an agency upon the part of the former for the latter, in the making of contracts for transportation. The agreement between those companies only bound the railroad company to 'receive, load and unload, deliver and way-bill' such freight as was sent to it by the Dispatch Company, and at the rates established; not by the latter, but by the defendant and other railroad companies."

So we submit, in the case at bar, that the agreement beetween the receiver and the Terminal Railroad Association only bound the latter to properly take care of and handle all freight which the former might deliver to it on the designated "Y," and at the rates established, not by the receiver, but by the Terminal.

It might as well be argued that every railroad company which enters into an agreement with a coal company to furnish it so many cars a day and to haul those cars at a certain price, thereby becomes the agent of the coal company, or thereby leases to it the cars and that portion of the rails necessary to make the haul contemplated.

VI.

The Terminal Association had received shipping directions.

In view of the custom which existed between the two companies by which the Terminal Association was to take possession of a car which the receiver placed on its rails, we submit that the depositing that car on the designated place is tantamount to a shipping direction.

The Terminal Association voluntarily accepted such cars from the receiver knowing them to be, at the time of such acceptance, in transit. The mere fact of the cars being at the designated place, had always been accepted by the Terminal as notice to it that such cars were in transit, and were to be hauled over its rails, either to some other railroad or into the city of St. Louis. With this knowledge and notice, the Terminal Association was accustomed to haul these cars to a certain point on its rails and there await further information from the receiver as to the ultimate shipping direction. The Terminal knew when it took possession of them, that they were *never* to be handled by the receiver again under the bill of lading or way-bill which accompanied them.

Ultimate shipping directions as between these two companies were regulated by an understood course of

dealing between them. Such a car, for instance, as the one in question, should in any case and by reason of the peculiar character of the carrying business conducted by the Terminal Association, remain for a time stationary at some point on its rails most convenient to it A certain portion of the transit could be traversed by the Terminal whether the ultimate shipping directions were contemporaneous with the delivery or came some hours later. As to this car, following the custom, the receiver had not at the time sent such ultimate directions, but they would have come in due course had the car not been destroyed, and would have been within ample time to suit the convenience of the Terminal Association in moving this car on to the rails of the next connecting carrier.

A state of facts very similar to this was attempted to be proven in the case of *Mt. Vernon Co. vs. Alabama R. R., 92 Ala., 296.* The car in question was brought to the place of junction between the connecting carriers, which was a station called Attala, and and there placed by defendants servants on a sidetrack belonging to the connecting carrier, which the latter was expected to move along towards the place of ultimate destination. No notice of this was given to the connecting carrier, and the car was destroyed on the side track. There the defendant undertook to prove that, by a course of dealing between itself and the connecting carrier, the latter was accustomed to re-

ceive on said side track and haul over its rails to the Chattanooga Compress, cars laden with cotton, and there await the way-bill or ultimate shipping direction. In this matter of proof, however, it was unsuccessful. But the court was evidently of opinion that if the car in question had been so taken and hauled to the Chattanooga Compress, it would have been delivered, suggesting that such a course of dealing would have been tantamount to a shipping direction to the connecting carrier to haul the car, as far, at least, as the Chattanooga Compress.

So in the case at bar, the Terminal Association knew, when it found this car in question on this "Y," and took possession of it, that it was to be hauled over its own rails, in any case as far as to the place of loss. For that much of the transit over its own rails, the Terminal Association needed no further shipping directions.

We therefore submit that, under these circumstances, all the regulations prescribed by the the custom were complied with by the receiver, and the delivery to the terminal was sufficient to charge it with the liability of a connecting carrier.

VII.

The carrier which had possession of the freight at the time of the fire is liable.

As we have heretofore said, the contract under which the receiver undertood to carry these goods was implied from his act of receiving the same for transportation, and that therefore under the common law rule it is only necessary for him to carry them to the end of his own rails and deliver them to the next connecting carrier, since the implied obligation of a carrier to the public is limited by the termini of his own route.

P. C. & St. L. Ry. vs. Morlon, 61 Ind., 539;
Ogdensburg vs. Pratt, 22 Wall., 129;
Mich. Cent. vs. Mineral Springs, 16 Wall., 324;
St. Louis Ins. Co. vs. St. Louis R. R. Co., 104 U. S., 685.

If, however, it can be said that the carriage by the receiver was pursuant to an express contract, that contract is to be found on the bill of lading (R. p. 44) which among other things contains this stipulation:

> "* * * It is further especially agreed that for all loss and damage occurring in the transit of such packages, the legal remedy shall be against the particular carrier or forwarder only, in whose custody the said packages may *actually* be at the time of the happening thereof,

it being understood that the said Chicago, Milwaukee & St. Paul Railway Company assumes no other responsibility for their safe carriage or safety than may be in incurred on it own road."

Therefore it is to be seen that either by the implied contract of carriage, or the express contract of carriage, the shipper must look to the carrier in whose custody the freight was *actually* at the time of its loss, and this carrier, we submit under the evidence in this case, and as a matter of fact, was the Terminal Railroad Association of St. Louis.

Conclusion.

In conclusion we respectfully urge that this court will grant a writ of certiorari in this matter, and will take and review the decision of the Circuit Court of Appeals in this case, reversing the same with directions to dismiss the intervening petition of the Carr, Ryder & Engler Company.

Respectfully submitted,

Bluford Wilson

Phelps Barton Wilson

Solicitors for C. H. Bosworth, Receiver Chicago, Peoria & St. Louis Railway.